

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 05/19/2015

TIME: 08:20:00 AM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Tiffany Froedge

REPORTER/ERM: Malena Homan

CASE NO: **56-2014-00458073-CU-AS-VTA**

CASE TITLE: **Robert Denyer vs AB Electrolux**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Asbestos

EVENT TYPE: Motion - Other (CLM) for trial preference

MOVING PARTY: Robert Denyer, Gertrude Denyer

CAUSAL DOCUMENT/DATE FILED: Motion - Other for Trial Preference, 04/23/2015

APPEARANCES

Stephen M. Fishback, counsel, present for Plaintiff(s).

Michael Schuck, specially appearing for counsel Kenneth B Prindle, present for Defendant(s).

Robert Menchini, specially appearing for counsel Gary D Sharp, present for Defendant(s).

Soniya Khemlani, specially appearing for counsel Hillary H Huth, present for Defendant(s).

Taylor Day, specially appearing for counsel Amy Talarico, present for Defendant(s).

Fred Lee, specially appearing for counsel Claire C Weglarz, present for Defendant(s).

Nathan T Newman, counsel, present for Defendant(s) telephonically.

Howard Ruddell, specially appearing for counsel LISA K OBERG, present for Defendant(s).

ANN I PARK, counsel, present for Defendant(s) telephonically.

Samantha Jackson, specially appearing for counsel Kelvin Wyles, present for Defendant(s).

Joseph Greenslade, counsel for Union Carbide;

Christopher Sargay, counsel for Sears and Roebuck & Co

Additional appearances listed on last page.

At 08:59 a.m., court convenes in this matter with all parties present as previously indicated.

Telephonic appearance by counsel for Hill Brothers Chemical Co; Mechanical Drivers & Belting; Goodman Global; Electrolux; Bell Industries; Goodloe E. Mooer.

Counsel have received and read the court's written tentative ruling.

Matters regarding Hipa, discovery, and update on parties that have not yet answered are submitted to the Court with argument.

The Court finds/orders:

The Court's tentative is adopted as the Court's ruling.

The court's ruling is as follows:

The Court grants Plaintiffs' request for a trial preference under the mandatory provisions of *Code of Civil Procedure* section 36(a); sets a trial date of Monday, September 14, 2015; finds "good cause" under *Code of Civil Procedure* section 437c(a) to have motions for summary judgment/adjudication set for hearing up to and including the first day of trial; and declines to issue any blanket discovery orders, but indicates that in light of the truncated timeframe now remaining to complete discovery in this case – the Court will liberally entertain *ex parte* applications to set discovery motions for hearing on shortened time.

In light of the shortened trial setting, the Court believes that additional orders are necessary to protect all parties' rights to conduct discovery and file dispositive motions, including (i) that both parties immediately and fully identify all co-workers and product identification witnesses on which they rely and either produce them for deposition within 30 days or provide contract information within 3 days of the hearing on this motion; (ii) both parties immediately produce any and all medical, employment, Social Security and other pertinent records they have in their possession and/or control; (iii) that fact discovery remain open until two weeks before trial and expert discovery remain open until 5 days before trial, absent some other stipulation between counsel, and that the demands for exchanges of expert information be deemed served, and a date be set for disclosure of expert witnesses at 30 days before trial, with parties' making their expert witnesses available for deposition on 7 days' notice.

Given the shortened trial setting, the Court expects all parties to cooperate to ensure that reasonably necessary discovery is completed prior to trial. The Court will not hesitate to impose sanctions if it concludes that any party or parties are not providing discovery in a timely manner.

The Court grants Plaintiff's request no more than 3 expert depositions per day and no more than 3 Motions for Summary Judgment per day.

Discussion:

Plaintiff alleges that he suffers from Stage IV lung cancer due to the synergistic effect of a combination of smoking and occupational exposure to asbestos. He is 78 years old. His lung cancer has spread to the bones of his spine, and he suffers from chronic kidney disease (stage four), and severely reduced kidney function. Plaintiff Robert Denyer seeks a preferential trial date so that he may have his day in court before he passes away.

With their "reply papers," Plaintiffs filed new evidence in the form of the declarations of Plaintiff Robert Denyer and Plaintiffs' counsel Tenny Mirzayan, and the supplemental declaration of Dr. Ann Wierman. Defendant Certaineed Corporation, joined by Defendant Duro Dyne Corporation, objects to Plaintiffs' "reply" evidence on the ground that it is untimely. *Code of Civil Procedure* section 1005(b) provides, in pertinent part, that: "Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing." Pursuant to §1005(b), the evidence submitted in support of a motion should normally be submitted with the moving papers. The Court has the discretion to consider new evidence or arguments presented for the first time in reply papers. (See, e.g., *See Jay v. Mahaffey* (2013) 218 Cal. App. 4th 1522, 1537-1538; *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307-1308 ["*Alliant*"]); *Hahn v. Diaz-Barba* (2011) 194 Cal. App. 4th 1177, 1193.)

The Court believes it is appropriate to consider the new reply evidence for two reasons. First, neither of the declarations raise new issues or support any new arguments; instead, they merely respond to arguments made in Defendants' Opposition Briefs. Thus, Plaintiffs' "reply" evidence is most appropriately characterized as the "fill in the gaps" kind of evidence that *Jay v. Mahaffey* suggests may properly be submitted with reply papers. (See Footnote 3, *supra*.) Second, Defendants do not directly challenge the fact that Plaintiff's medical condition makes him eligible for a trial preference under *Code of Civil Procedure* section 36(a). Defendants do not submit any evidence suggesting that Plaintiff's health has not deteriorated to the extent stated in Plaintiffs' moving papers. Instead, Defendants' Opposition Briefs merely make technical arguments regarding the sufficiency of Plaintiffs' evidence to establish Plaintiff Robert's medical condition. Given that the Court is literally faced with a question of life and death (i.e., will Plaintiff Robert Denyer be alive at the time of trial), the Court should exercise its discretion to consider all relevant evidence about Plaintiff's condition.

Under *Code of Civil Procedure* section 36(a), there are three requirements for a preference under this provision: (i) the party must be over 70 years old; (ii) the party must have a substantial interest in the action as a whole; and (iii) the health of the party must be such that a preference is necessary to prevent prejudicing the party's interest in the litigation. Requirement (i) is satisfied because Plaintiffs submit evidence indicating that Plaintiff Robert is 78 years old. (See Original Wierman Decl., ¶7; Robert Denyer Decl., ¶2.) Requirement (ii) is satisfied, because Plaintiff Robert is one of two Plaintiffs in this action and may be fairly characterized as the "main" Plaintiff, his wife's claim for loss of consortium being related to Plaintiff Robert's claims. Requirement (iii) is satisfied, because Plaintiff Robert has lung cancer, is undergoing chemotherapy and taking medications, his mental and physical and mental condition is rapidly deteriorating, and there is a substantial medical doubt that he will be alive 6 months from now. (See Original Wierman Decl., ¶¶4-7; Robert Denyer Decl., ¶2-4, 6, 7; Suppl. Wierman Decl., ¶¶3-5.) Simply stated, the evidence indicates that Plaintiff Robert's cancer is life-threatening, his health is rapidly deteriorating, and there is a substantial probability that he will be unable to participate in the trial of his own claims and testify in support thereof if his request for a trial preference is granted.

Defendants object to some of Dr. Wierman's statements based on lack of foundation, arguing that Dr. Wierman omits certain factual details regarding her treatment of Plaintiff Robert and his prognosis.

However, the statute does not require that Dr. Wierman provide all of the medical details regarding Plaintiff Robert; rather, it only requires Plaintiffs to submit evidence sufficient to indicate that Plaintiff Robert's health is such that a trial preference is required to protect his interests in this action. In fact, by statute, the evidence of Plaintiff Robert's health condition does **not** have to be admissible, but can be submitted in the form of a declaration of Plaintiff's counsel "on information and belief." (See Code of Civil Procedure §36.5.) Here, the declarations of Plaintiff Robert and his treating physician Dr. Wierman clearly have more probative value than a statement of Plaintiffs' counsel "on information and belief."

Pursuant to *Code of Civil Procedure* section 36(a), the Court **must** grant a motion for a trial preference when a party is over 70 years old and the health of that party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation. Plaintiff Robert Denyer is also entitled to a trial preference pursuant to section 36, subdivisions (d) and (e). He is suffering from end-state lung cancer that has metastasized, and suffers from diminishing emotional, mental, and physical health. His memory, and his ability to assist his counsel and participate in this action, is rapidly deteriorating. Accordingly, a preferential trial date is necessary to give him his day in court, and the interests of justice will be served by the granting of such a preference.

Based on the above, the Court grants Plaintiffs' request for a trial preference under §36(a). Pursuant to section 36(f), the Court must set the matter for trial not more than 120 days from the May 19, 2014 hearing date on this motion, or Wednesday, September 16, 2015. Because trial dates are set for Monday in this Court, the latest possible trial date would be Monday, September 14, 2015.

Plaintiffs request that the Court set a trial date only 60 days out, in July 2015. However, Plaintiffs fail to demonstrate that such a short time frame is necessary; nor, do Plaintiffs provide any justification for failing to bring a motion for a trial preference sooner. Simply stated, 60 days notice is so short that it will make the considerable challenges posted by a 120-day trial date an order of magnitude greater.

The Court finds good cause to allow summary judgment/adjudication motions to be heard as late as the first day of trial. (see Code of Civil Procedure §437c(a)), but declines to allow Defendants to file and serve their motions less than 75 days prior to the hearing date. In order to facilitate the short discovery period the Court will entertain *ex parte* applications to have discovery motions heard on shortened time, so that urgent disputes may be resolved more expeditiously.

The court date of 05/27/15 remains as previously ordered.

The court moves Motion and Joinders set for 6/9/15 to 6/10/15 at 8:20 a.m. in Courtroom 43.

The court sets matter for jury trial on 9/14/15 at 1:30 p.m. in Courtroom 43.

Formal order to be submitted by Mr. Fishback.

ADDITIONAL APPEARANCES:

Bjorn Green, specially appearing for counsel ROBERT W. ARMSTRONG, present for Defendant(s).
Rod Cappy, specially appearing for counsel Jeffrey W Deane, present for Defendant(s).
Previn Wick, specially appearing for counsel FRANK D. POND, present for Defendant(s).
Anthony J Calero, counsel, present for Defendant(s) telephonically.